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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-626

COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Shields Sims
Darrell Reeves
Sims & Sims
Post Office Box 648
Columbus, Mississippi 39701
Attorneys for Petitioner

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 504 822-1611

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Columbus Municipal Separate School District petitions for writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

I.
OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit dated August 9, 1977, is reported at ___ F. 2d ___ and is reproduced in the Appendix at 1a. The opinion of the United States District Court for

the Northern District of Mississippi dated June 28, 1976 is unreported and is reproduced in the Appendix at page 19a. The Orders based on said opinion are dated July 12, 1976 and August 11, 1976, and are reproduced in the Appendix at Pages 31a and 40a, respectively. The opinion of the United States District Court for the Northern District of Mississippi, dated May 6, 1976 is unreported and is reproduced in the Appendix at page 9a. The Order based on said opinion is reproduced in the Appendix at Page 54a.

II.
JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1). This petition for certiorari is presented within 90 days of the date of the judgment of the Fifth Circuit.

III.
QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that school districts are constitutionally prohibited from using neighborhood school assignment if the school districts contain ethnically concentrated residential areas, even though the use of neighborhood assignment is for non-discriminatory, educational reasons?

2. May a Court require a remedy involving extensive further transportation of younger elementary school children to obtain greater desegregation despite ruling of District Court that both of the plans submitted by the school district were constitutional, which ruling the District Court vacated and reversed itself approximately 52 days later to order pairing of certain elementary schools within the district?

IV.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are involved in this case and are set forth in the Appendix:

(a) Fourteenth Amendment to the United States Constitution;

(b) 20 U.S.C. Sections 1701-68; 1701 (a) (2); 1702 (a) (3-5); 1705; 1712; 1720 (b).

V.
STATEMENT OF THE CASE

A. Description of the School District and its Policies.

The Petitioners entered into a Consent Decree with the United States on August 6, 1970, for the purpose of desegregating the Columbus Municipal Separate School District. The desegregation issue remained dormant, with the Defendants filing bi-annual reports with the Court and with the Justice Department, until the United States District Court for the Northern District of Mississippi ordered the Defendants, on July 9, 1975, pursuant to a Show Cause Order filed by the Government, to show cause why they should not be required for the 1975-76 school year and thereafter to develop and implement, a plan of student assignment, which would fully desegregate the public elementary schools of Columbus, Mississippi. Petitioners complied with the various orders of the Court and after several hearings, the Court, disregarding Plans A and B, filed by the Defendants, and previously approved by

the Court, entered its Order, implementing a desegregation plan for the pairing of six elementary schools in the district, commencing in September 1976. On August 27, 1976, the Court pursuant to a Motion to Stay filed by the Petitioners, granted a Stay in the case for one year, until August 1, 1977.

Petitioners are of the opinion that this is not the usual type of desegregation case which comes before this Court. The Defendants at the time of the Show Cause Order, were operating under a Consent Decree, which fully integrated grades 7 through 12, in the Columbus Public School System. In addition, the faculties in all schools were integrated. All the facts were reported to the Court and to the Government each semester, through reports filed by the Petitioners. These reports were received without comment from the Government for six years. Further, the District Court, after finding that the last two plans filed by the Defendants, Plans A and B, would result in elimination of the racial identification of both the predominately white elementary schools in the system and the three predominately black elementary schools (Ruling of the Court, May 6, 1976 App. 9a), reversed itself on June 1, 1976, (Ruling of the Court — App. 19a), and refused to approve either of said plans and ordered implementation of a pairing plan approved by the Government and the United States Air Force.

B. The Court of Appeals' Opinion:

In its appeal to the Fifth Circuit Court of Appeals, the Petitioners pointed out to the Court that the District Court had approved either Plans A or B, submitted by the Petitioners and permitted the Petitioners to select which plan they would implement. Thereafter, the Petitioners chose to implement Plan B. Approximately 52 days later, on a Petition for Rehearing, filed by the United States and joined in by the United States Air Force, the District Court reversed itself and ordered a pairing plan suggested and supported by the United States. (No where is it shown that the Air Force actually urged or supported said pairing plan.) In its opinion, the Court of Appeals held, "there can be no doubt that Columbus' system wide constitutional violation calls for system wide relief." As the Supreme Court has repeatedly emphasized, the nature and extent of the constitutional violation must determine the scope of the remedy (the Petitioners question the Court of Appeals' finding that there was a system wide constitutional violation.) The case was affirmed by the Court of Appeals.

VI.
REASONS FOR GRANTING THE WRIT

1. The Findings of De Jure Segregation Based on the Racial Imbalance caused by Neighborhood Schools.

The question presented by this case is, quite simply, the constitutionality of the use of neighborhood school assignment — assignment of students to the school of their level closest or most convenient to their homes — in areas of racial concentration where racially imbalanced schools result. Because racial concentration exists in almost all urban and many non-urban areas and because the many advantages of neighborhood school assignment have made its use

nearly universal, this question is undoubtedly the most important question in school desegregation litigation today, and it may well be the most troubling question facing the country. The holding of the Court of Appeals for the Fifth Circuit that pairing achieves much greater desegregation than does the plan of the District without passing intolerable burdens, is in conflict with the congressional declaration of policy in the Equal Educational Opportunity Act of 1974 that "the neighborhood is the appropriate basis for determining public school assignments." The consequences of the decision of the Fifth Circuit, if allowed to stand by this Court, are likely to be extremely harmful to the goal of quality integrated education in Columbus, Mississippi. We submit, therefore, the grant of this petition to review the decision of the Fifth Circuit is strongly supported by every relevant consideration set out by this Court in Rule 19. There can be no doubt as to the basis on which the District Court and the Fifth Circuit ruled that a pairing plan should be implemented in the Columbus system. The District Court's task was to fashion a remedy eliminating the system wide violation "root and branch." *Keyes v. School District No. 1*, 413 U.S. 189, 213, 93 S.Ct. 2686, 37 L. Ed. 2d. 548 (1973) quoting *Green v. County School Board*, 391 U.S. 430, 438, 88 S. Ct. 1689, 20 L. Ed. 2d 716 (1968). And the overriding goal was, "to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Board of School Commissioners*, 402 U.S. 33, 37, 91 S. Ct. 1289, 1292, 28 L. Ed. 2d 577. As to the District Court's application of the above standards, the Fifth Circuit said:

> The District Court's application of these principles was beyond reproach. The parties narrowed the remedial alternatives to two: pairing and Plan B. In light of the proposals' effects on desegregation and the other implicated interests, we uphold the District Court's choice of pairing.
>
> Pairing promises far greater desegregation, bringing every school in the district within a relatively narrow range of the racial composition of the district as a whole. Under Plan B., in contrast, only three of the ten elementary schools would have black populations falling within twenty percentage points of the system wide figure of 53 percent. The black populations in the four traditionally black schools, would vary from 74 percent to 82 percent. The black populations in these traditionally white schools would vary from 22 percent to 26 percent.
>
> . . .
>
> In sum, pairing clearly will achieve much greater desegregation than Plan B. That conclusion does not end our inquiry; there are other interests at stake. The desegregation disparity between the plans is substantial; however, and the pairing plan would therefore be preferred absent a showing of important other advantages attributable to Plan B.
>
> Plan B. concededly has virtues pairing lacks. By adhering more closely to the neighborhood school concept, Plan B. allows more students to walk to school. Busing, however, was a tool of this and other educational sys-

> tems long before desegregation became an issue, and many Columbus students will ride buses regardless of the choice between pairing and Plan B. The burden students will bear as a result of the pairing proposal's increase in busing, with routes of less than half an hour for any student, pales in comparison to the interests in attending schools free of racial discrimination.

Despite the disclaimer of the Fifth Circuit that statistics as to black to white ratios are not controlling, clearly it can be seen from reading their decision, with repeated references to "far greater desegregation" and "much greater desegregation", that they consider the ultimate goal of desegregation to be a black to white ratio in each school which approaches the system wide racial ratio. Clearly, this is an erroneous conclusion on their part.

Brown v. Board of Education, 347 U.S. 483 (1954), held that state-compelled school segregation is unconstitutional. In *Green v. County School Board*, 391 U.S. 430, 437-438 (1968), school boards were charged with the duty to eliminate racial discrimination and all its effects from school systems; to see, as this Court stated, "that state-imposed segregation has been completely removed." *Id.* at 439. The duty is not, as the Fifth Circuit apparently believes, to remove, remedy or prevent racial imbalance in schools not caused by racial discrimination. Three years after *Green*, this Court reiterated, in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15 (1971), that "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation."

School authorities, the Court said, could decide that "each school should have a prescribed ratio of negro to white students reflecting the proportion for the district as a whole," but "absent a constitutional violation, . . . that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy." *Id.* at 16. This Court further stated that if the holding of the District Court were read, "to require, as a matter of substantive constitutional right, any particular degree of racial imbalance or mixing, that approach would be disapproved and we would be obliged to reverse." *Id.* at 24.

This Court's decision in *Milliken v. Bradley*, 418 U.S. 717 (1974), unfortunately ignored by the Fifth Circuit, is squarely in point. In that case this Court held that the existence of predominately black schools in one school district and predominately white schools in adjacent districts did not, absent a showing that the imbalance was caused by racial discrimination, create an obligation to remove the imbalance. Racially neutral geographic assignment, the decision makes clear, is not constitutionally prohibited merely because racially imbalanced schools result. The desegregation remedy, the Court pointed out, "is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position that they would have occupied in the absence of such conduct." *Id.* at 746.

The District Court, as well as the Court of Appeals, found the elementary schools of the School District to be unconstitutionally segregated on the basis of the School District's use of neighborhood assignment or

any assignment, whenever, as is almost always and everywhere the case, racially or ethnically imbalanced schools result. The distinction between constitutionally prohibited "*de jure*" segregation and constitutionally permissible "*de facto*" segregation (racial or ethnic imbalance) is thereby abolished, and racial or ethnic imbalance itself is made everywhere unconstitutional.

Of course, school racial or ethnic imbalance can always be eliminated by abandoning neighborhood assignment and adopting racial or ethnic assignment and the transportation of children out of their neighborhood. But that fact does not make the use of neighborhood assignment, given its many racially and ethnically neutral advantages, evidence of a purpose to segregate. *Austin Independent School District v. United States*, 97 S.Ct. 515 (1977). Decisions of the Supreme Court, subsequent to the *Austin Case* have reaffirmed the importance of the distinction between unconstitutional racial or ethnic segregation and constitutionally permissible racial or ethnic imbalance and have made clear that a showing of a racially or ethnically discriminatory purpose by school authorities is essential to a finding of unconstitutional segregation. It is now clear, therefore, that the legal standard applied by the Fifth Circuit Court of Appeals to reverse the Texas District Court's finding of no unconstitutional segregation of Mexican-Americans is incorrect. *Austin Independent School District v. United States*, Supra. The basic decision is, of course, *Washington v. Davis*, 426 U.S. 229 (1976), the decision on the basis of which the Fifth Circuit's decision was vacated and remanded.

Washington involved a constitutional challenge to the use of a qualifying test — "designated to test verbal ability, vocabulary, reading and comprehension" (426 U.S. at 235) — for applicants for police officer positions in the District of Columbia. A "far greater proportion of blacks — four times as many — failed the test than did whites." *Id.* at 237. Plaintiffs, black police officers and applicants for police officer positions, contended that the use of the test should be held to be racially discriminatory in violation of the Equal Protection Clause because of this racially disproportionate impact. Reversing the Court of Appeals for the District of Columbia Circuit, the Supreme Court, in an opinion by Justice White, upheld the use of the test despite this undeniable effect. "Our cases have not embraced the proposition," the Court stated, "that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." *Id.* at 239. The Court had "difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person equal protection of the laws', simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups." *Id.* at 245. It is found that "the test is neutral on its face and rationally may be said to serve a purpose the government is constitutionally empowered to pursue". *Id.* at 246. To the extent that various Court of Appeals' decisions have rested on or expressed the view that proof of racially discriminatory purpose is unnecessary in making out an equal protection violation, the Court said, "we are in disagreement." *Id.* at 245.

Specifically addressing itself to the issue of finding unconstitutional school segregation, the Court made explicit that the standard is the same as in other cases of alleged racial discrimination:

> The school desegregation cases have also adhered to the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose. That there are both predominately black and predominately white schools in a community is not alone a violation of the Equal Protection Clause.
>
> *Id.* at 240.

The direct conflict between the standard applied by the District Court and the Court of Appeals finding unconstitutional Plans A and B, submitted in this case and the standard applied by the Supreme Court in *Washington* can readily be seen by applying the District Court and the Fifth Circuit's standard to the facts of *Washington*. The District Court and the Fifth Circuit found a constitutional violation because (1) it has been the School District's policy to assign students to the school closest to their homes; (2) the City of Columbus generally has ethnically concentrated housing patterns; (3) the natural, foreseeable and inevitable result has been ethnically imbalanced schools; (4) the School District could have abandoned neighborhood assignment; (5) The School District nevertheless continued to use neighborhood assignments; (6) hence, the inference is inescapable, the purpose of the School District in using neighborhood assignment was to discriminate against blacks. Applied to the facts of *Washington*, this standard would result in a constitutional violation because (1) it has been the police department's policy to give a qualifying test to job applicants; (2) blacks have generally fared worse on that test than whites; (3) the natural foreseeable and inevitable result of the continued use of the test has been disqualification of more blacks than whites; (4) the department could have abandoned the test; (5) the department nevertheless continued to use the test (6) hence, the inference is inescapable, the reason (purpose or motive) the department chose to continue to use the test was to discriminate against blacks. The Supreme Court rejected the panel's standard in *Washington* because it renders meaningless the requirement of finding of impermissible discriminatory purpose in order to find an Equal Protection Clause violation. In the school context, it would abolish the distinction between "*de jure*" and "*de facto*" segregation and make virtually all racial or ethnic imbalance unconstitutional.

The fallacy of the District Court and the Court of Appeals reasoning is that a policy of neighborhood assignment of children to schools — to schools of their level closest or most convenient to their home — is, like the use of the qualifying test in *Washington*, racially or ethnically neutral on its face and rationally may be said to serve a purpose government is constitutionally empowered to pursue. As Justice Powell pointed out in his concurring and dissenting opinion in *Keyes* neighborhood school assignment has "several valuable aspects which are an aid to education, such as minimization of safety hazards to

children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards, and better home-school communications." 413 U.S. at 245-46. "These are obvious and distinct advantages," he continued, "but the legitimacy of the neighborhood concept rests on more basic grounds:

> Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education. Public schools have been a traditional source of strength in our Nation, and that strength may derive in part from the identification of many schools with the personal features of the surrounding neighborhood. Community support, interest and dedication to public schools may well run higher with a neighborhood attendance pattern; distance may encourage disinterest.
>
> *Id.* at 246[1].

That a violation of the Equal Protection Clause cannot be found on the basis of the racially discriminatory impact of official action absent a showing of racially discriminatory purpose was reaffirmed by the Court even more recently in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 45 U.S.L.W. 4073 (Jan. 11, 1977). In that case the non-profit

1 Further, as will be shown under Point 2, *Infra*, such assignment methods have been made the national policy by reason of 20 U.S.C.A. Section 1701, of the Equal Educational Opportunity Act of 1974.

Metropolitan Housing Development Corporation (MHDC) requested the Village of Arlington Heights, a suburb of Chicago in Northwest Cook County, to rezone a fifteen acre parcel of land from single-family to multiple-family classification so that publicly subsidized housing could be provided for low and middle income families. Arlington Heights refused the request on the grounds that the proposed development would adversely affect the property value of neighboring sites and that the multiple-family classification was allowed only to provide a buffer zone between single-family and industrial areas. MHDC and a group of black and Mexican-American individuals challenged this action by Arlington Heights, claiming that it constituted unconstitutional racial discrimination. The Court of Appeals for the Seventh Circuit upheld the claim because, as stated by the Supreme Court:

> Northwest Cook County was enjoying rapid growth in employment opportunities and population, but it continued to exhibit a high degree of residential segregation. The Court held that Arlington Heights could not simply ignore this problem. Indeed, it found that the Village had been 'exploiting' the situation by allowing itself to become a nearly all-white community. 517 F.2d at 414. The Village had no other current plans for building low or moderate income housing and no other (multiple-family) parcels in the Village were available to MHDC at an economically feasible price.
>
> *Id.* at 4075.

Reversing the decision of the Seventh Circuit, the Supreme Court stated:

> Our decision last Term in *Washington v. Davis*, 426 U.S. 229 (1976) made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination.' *Id.* at 242. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.
>
> 45 U.S.L.W. at 4077.

Although it agreed that "the impact of the Village's decision does arguably bear more heavily on racial minorities," the Court held: "Respondents simply failed to carry their burden of proving that discriminatory purpose was a motivating factor in the Village's decision. This conclusion ends the constitutional inquiry. The Court of Appeals' further finding that the Village's decision carried a discriminatory 'ultimate effect' is without independent constitutional significance." *Id.* at 4078.

Application of the basic principle of *Washington* and *Arlington Heights* is the context of alleged unconstitutional school segregation is illustrated by two other recent decisions by the Supreme Court, *Pasadena City Board of Education v. Spangler*, ___ U.S. ___, 96 S.Ct. 2697 (1976), and *Milliken v. Bradley*, 418 U.S. 717 (1974). In *Pasadena*, the school district had

been found to have once had an unconstitutional segregated school system. This segregation has been remedied by implementation of a Court-ordered assignment plan that made all the schools in the system majority white. As a result of population movements and the school district's continued use of its established method of assignment, racially imbalanced schools again appeared. The lower court held that the school district was constitutionally required to alter its method of assignment in order to avoid this segregative effect. The Supreme Court reversed, holding that a school district is not constitutionally required to abandon a neighborhood assignment policy in order to overcome the racial imbalance that results in areas of residential racial concentration; the mere existence of racially imbalanced schools not resulting from purposeful racial discrimination by the school district does not, the decision illustrates, established unconstitutional segregation requiring or justifying a remedy.

Milliken also makes clear that the mere existence of racially imbalanced schools resulting from racially neutral student assignment does not establish a constitutional violation. The Schools of the Detroit School District were predominantly black, and those of surrounding suburban districts were predominantly white; it was within the power of the State of Michigan to change this situation by changing the method of assignment of students to schools. The Court held, however, that Michigan had no constitutional obligation to do so absent a showing that the method of assignment used not only caused the existing racial imbalance but was adopted for the purpose of racial segregation. The Court emphasized that

its decision rested on the principle that the existence of racially imbalanced schools, even in close proximity, does not of itself establish a constitutional violation requiring remedy and that the decision did not rest on the fact that a court order to increase racial balance would have in that case required the crossing of school district lines: "School district lines and the present laws with respect to local control are not sacrosanct and if they conflict with the Fourteenth Amendment federal courts have a duty to prescribe appropriate remedies." 418 U.S. at 744. If there could be any doubt about this at the time of *Milliken*, it has been removed by the Court's decision in *Hills v. Gautreaux*, 425 U.S. 284 (1976). In *Hills* the Court reiterated that its reversal in *Milliken* of the lower courts' requirement of interdistrict relief was not because of "the many practical problems that would be encountered in consolidation of numerous school districts by judicial decree," but most federal court power "may be exercised 'only on the basis of a constitutional violation' " (*Id.* at 293, quoting *Milliken*, 418 U.S. at 739, which quoted *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16 (1971)), and the existence of racially imbalanced schools, resulting from nondiscriminatory assignment, in an area does not establish a constitutional violation.

The Supreme Court's very recent decision in *Metropolitan School District v. Buckley*, 45 U.S.L.W. 3508 (Jan. 17, 1977), vacating and remanding the decision of the Sixth Circuit in *United States v. Board of School Commissioners of City of Indianapolis*, 541 F.2d 1211 (1976), further illustrates that in the absence

of a proven purpose to segregate, the existence of predominantly black schools in close proximity to predominantly white schools does not establish a constitutional violation despite the fact that the continued existence of such racial imbalance is an inevitable effect of official action and should be changed by other official action. In brief, the City of Indianapolis expanded its boundaries to include suburban areas (nearly all white), but the boundaries of the Indianapolis Public School District (forty-two percent black), formerly contiguous with the city, were not changed. The school district would have had the power to expand with the city except that legislation depriving it of this power was adopted sixteen days before the city's expansion. The holding of both lower courts that unconstitutional segregation requiring remedy could be found on this basis was vacated and remanded by the Supreme Court for further consideration in light of *Washington v. Davis*, and of *Arlington Heights*.

It is, therefore, improper to argue that there is a constitutional violation by showing the existence of racially or ethnically imbalanced schools. It is necessary to show that racial or ethnic school imbalance exists as the result of actions by school authorities taken for the purpose of segregating. Ordinarily, of course, the burden of proving such a purpose rests upon the party or parties alleging unconstitutional segregation. In the present case, however, the District Court imposed the burden of disproving discriminatory purpose on the Petitioner's School District.

The Court of Appeals ruling that Columbus' system wide constitutional violation called for system wide relief is unsupported by the facts. We agree that the Supreme Court has repeatedly emphasized, the nature and extent of the constitutional violation must determine the scope of the remedy. *Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 41 L. Ed. 2d 1069 (1974) Milliken 1); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 Supreme Court 1267, 28 L. Ed. 2d 555 (1971). When there has been "a system wide impact" courts must fashion "a system wide remedy". *Dayton Board of Education v. Brinkman*, ___ U.S. ___, 97 S.Ct. 2766, 52 L. Ed. 2d ___ (1977). However, we submit that there has not been in this case, a system wide violation, in as much as the Petitioners have been in compliance with the Consent Decree since its entry on August 6, 1970.

The legal standards for formulating the proper remedy for proving unconstitutional segregation have also been clarified by the Supreme Court since *Austin* was decided by the Supreme Court. The applicable general principle was stated by the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15-16 (1971):

> A school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct by a balancing of the individual and collective interests, the condition that offends the Constitution. In seeking to define even in broad and general terms how far this remedial power extends it is important to remember

> that judicial powers may be exercised only on the basis of a constitutional violation.

The Court noted that school authorities might decide as a matter of educational policy that "each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole," but made clear that "that would not be within the authority of a federal court. As with any equity case, the nature of the violation determines the scope of the remedy." *Id.* at 16.

This limitation of federal court authority to steps necessary to remedy the constitutional violation found was clarified and applied by the Court in *Milliken v. Bradley*, 418 U.S. 717 (1974). The Court reiterated that "The controlling principal consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation." *Id.* at 744. Most important, the Court then restated the applicable standard with much greater specificity: "But the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." *Id.* at 746. The Court made clear that a constitutional violation ("racially discriminatory acts", by school officials) in the past does not provide a basis for a federal court order designed to increase school racial balance unless it is shown that the violation has had a "significant segregative effect;" that is, that the violation has been a "substantial cause" of and has "directly caused" the presently existing racial imbalance. *Id.* at 745. As pointed out above, *Hills v. Gautreaux*, 425 U.S. 284 (1976), removed any doubt that these prin-

ciples apply to all desegregation cases and not just to cases involving interdistricts remedies. That a federal court has no authority to "remedy" racial imbalance or the existence of majority black schools not shown to be directly caused by the constitutional violation found was further illustrated by the Supreme Court's decision in *Pasadena City Board of Education v. Spangler*, ___ U.S. ___, 96 S.Ct. 2697 (1976), also discussed above.

Finally, there is, of course, the very clear and specific statement of Justice Powell, joined by the Chief Justice and Justice Rehnquist, concurring in the Supreme Court's decision to vacate the Fifth Circuit Court of Appeals' decision in the case *Austin Independent School District v. United States*, 97 S.Ct. 515 (1977):

> The remedy ordered appears to exceed that necessary to eliminate the effect of any official acts or omissions. The Court of Appeals did not find that there is no evidence in the record available to us to suggest that absent those constitutional violations, the Austin School System would have been integrated to the extent contemplated by the plan. If the Court of Appeals believed that this remedy was coextensive with the constitutional violations, it adopted a view of the constitutional obligations of a school board far exceeding anything required by this Court.

While not suggesting that "transportation of pupils is never a permissible means of implementing desegregation," Justice Powell

> emphasized the limitation repeatedly expressed by this Court that the extent of an equitable remedy is determined by and may not properly exceed the effect of the constitutional violation. Thus, large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the school authorities fulfilled their constitutional obligations in the past. Such a standard is remedial rather than punitive, and would rarely result in the widespread busing of elementary-age children. A remedy simply is not equitable if it is disproportionate to the wrong.

In sum, the Supreme Court has now made clear that a proper finding of unconstitutional segregation (school racial separation caused by purposeful racial discrimination by school authorities) in the past does not automatically lead to or authorize a federal court order designed to increase school racial balance. The constitutional requirement is, after all, not racial balance but desegregation, that is, the undoing of present racial separation only to the extent that it is shown to be the result of past unconstitutional segregation. In order to support a federal court order designed to increase school racial balance, it is necessary — most importantly where the transportation of children would be involved — to show, in addition to a constitutional violation, that the order is limited to correcting the present racial imbalance, if any, resulting from that violation. The order must be limited to creating the degree of integration or racial balance that would exist if the violation had not occurred.

Further, in ordering a remedy limited to the constitutional violation found, a federal court must also find, as the Supreme Court had earlier made clear, that the remedy is feasible in the particular circumstances; that is the "practicalities of the situation" must be taken into account, *Davis v. Board of Commissioners of Mobile County*, 402 U.S. 33, 37, (1971). Justice Powell's opinion in this case points out:

> A related equitable principal, also applicable in fashioning a desegregation remedy, is that a Court has the duty to 'balance .... the individual and collective interests.' *Milliken v. Bradley*, 418 U.S., at 738. The individual interests at issue here are as personal and important as any in our society. They relate to the family, and to the concern of parents for the welfare and education of their children — especially those of tender age. Families share these interest wholly without regard to race, ethnic origin or economic status. It also is to be remembered, in granting equitable relief, that a desegregation decree is unique in that its burden falls not upon the officials or private interests responsible for the offending action, but rather, upon innocent children and parents.

There can be no doubt that, judged by the proper remedy standards as now clarified by the Supreme Court, the pairing remedy ordered by the District Court in this case and affirmed by the Circuit Court of Appeals is erroneous.

Finally, guided by the District Court's Consent Decree of August 6, 1970, the School District has been particularly attentive to the furnishing of equality of facilities, to assure equality of educational opportunities through programs specially designed to meet the needs of blacks and for students enrolled in special education classes, to utilize its authority to draw attendance zones to promote integration, and to locate new schools close to centers of population and determine the size and grade categories to promote integration. The District Court retained jurisdiction of the case and required the School District to make detailed semi-annual reports to notify the Court, the Government, and all other interested parties, of every proposed change in school attendance zones and of proposed new school construction.

Plan B, as drawn by the School District, approved by the Bi-racial Committee and initially by the District Court, as meeting constitutional standards, is clearly sufficient to remedy the school racial imbalance shown to be caused by the constitutional violation found. Indeed, there can be little doubt that it is more than sufficient in that the racial imbalance that it "remedies" was not in fact shown to be caused by the segregation of blacks that ended in 1970, the only constitutional violation found. There has certainly been no showing that, as is required by *Milliken*, the schools of the School District would be more racially balanced than they are now pursuant to Plan B. if the constitutional violation found had not taken place. It is virtually certain that they would not be, because existing racial (and ethnic) imbalance is plainly the result of residential patterns such as occur in all urban areas of the country. As Justice Powell pointed out

in *Keyes*, 413 U.S. at 223, n. 9 (1973), quoting Dr. Karl Taeuber:

> "No elaborate analysis is necessary to conclude from these figures that a high degree of residential segregation based on race is a universal characteristic of American cities. This segregation is found in the cities of the North and West as well as of the South; in large cities as well as small; in non-industrial cities as well as industrial; in cities with hundreds of thousands of negro residents as well as cities that are progressive in their employment practices and civil rights policies as well as those that are not."
>
> In his book, Negroes in Cities (1965), Dr. Taeuber stated that residential segregation exists "regardless of the character of local laws and policies, and regardless of the extent of other forms of segregation or discrimination." *Id.* at 36

Similarly, Justice Stewart pointed out, concurring in *Milliken*, 418 U.S. at 756 n. 2:

> It is the essential fact of a predominantly Negro school population in Detroit — caused by unknown and perhaps unknowable factors such as in-migration, birth rates, economic changes, or cumulative acts of private racial fears — that accounts for the 'growing core of Negro schools,' a 'core that has grown to include virtually the entire city.' The Constitution simply does not allow federal courts to

> attempt to change that situation unless and until it is shown that the State, or its political subdivisions have contributed to cause the situation to exist. No record has been made in this case showing that the racial composition of the Detroit school population or that residential patterns within Detroit and in the surrounding areas were in any significant measure caused by governmental activity, and it follows that the situation over which my dissenting Brothers express concern (predominantly black schools in Detroit with predominantly white schools nearby) cannot serve as the predicate for the remedy adopted by the District Court and approved by the Court of Appeals.

Justice Powell reiterated in his concurring opinion in this case:

> The principal cause of racial and ethnic imbalance in urban public schools across the country — North and South — is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing — whether public or private — cannot be attributed to school authorities. Economic pressures and voluntary pressures are the primary determinants of residential patterns.

See also, *Bradley v. School Board of Richmond, Virginia*, 462 F.2d 1058, 1066 (*en banc*, 4th Cir. 1972), *aff'd by an equally divided Court*, 412 U.S. 92 (1973)

We are convinced that what little action, if any, the Counties may seem to have taken to keep blacks out is slight indeed compared to the myriad reasons, economic, political and social, for the concentration of blacks in Richmond and does not support the conclusion that it has been invidious state action which has resulted in the racial composition of the three school districts. Indeed this record warrants no other conclusion that the forces influencing demographic patterns in New York, Chicago, Detroit, Los Angeles, Atlanta and other metropolitan areas have operated in the same way in the Richmond metropolitan area to produce the same result. . . . Whatever the basic causes, it has not been school assignment, and school assignment cannot reverse the trend.

Further, the District Court, in its opinion as a result of the hearing of May 6, 1976, found that Plan A or B, submitted by the School District was constitutionally adequate and that the practicalities of the situation in Columbus precluded any pairing order.

2. Whether the Equal Educational Opportunity Act of 1974 precludes the abandonment of Plans A or B, previously held constitutional by the District Court, in favor of the pairing order?

In the Equal Educational Opportunity Act of 1974, 88 Stat. 514, 20 U.S.C. Sections 1701-68 (1976 Supp.), Congress declared as a matter of national policy that "the

neighborhood is the appropriate basis for determining public school assignments." 20 U.S.C. Section 1701 (a) (2). In addition, Congress found:

> (3) the implementation of desegregation plans that require extensive student transportation has, in many cases, required local educational agencies to expend large amounts of funds, thereby depleting their financial resources available for the maintenance or improvement of the quality of educational facilities and instruction provided;
>
> (4) transportation of students which creates serious risks to their health and safety, disrupts the educational process carried out with respect to such students, and impinges significantly on their educational opportunity, is excessive;
>
> (5) the risk and harms created by excessive transportation are particularly great for children enrolled in the first six grades . . .

Id. Section 1702 (a) 3-5. Congress also found that the assignment of children to schools according to neighborhood" is not a denial of equal educational opportunity or of equal protection of the laws unless such assignment is for the purpose of segregating students on the basis of race, color, sex or national origin." *Id.* Section 1705.

Section 213 of the Act (20 U.S.C. Section 1712) provides:

> In formulating a remedy for a denial of equal educational opportunity or a denial of the equal protection of the laws, a court, department or agency of the United States shall seek or impose only such remedies as are essential to correct particular denials of equal educational opportunity or equal protection of the laws.

The Act does not purport to modify or diminish the authority of federal courts to enforce the Constitution. 20 U.S.C., Section 1720(b). That fact does not mean, however, that federal courts are authorized to ignore the Act or treat it as a nullity. Congress' declaration that the neighborhood is the appropriate basis for school assignment and its factual findings as to the financial costs, risks and harm of busing are, at a minimum, entitled to deferential consideration by federal courts. The pairing remedy ordered by the District Court and affirmed by the Court of Appeals is not justified under the facts existing in the Columbus Municipal School District and is not in conformance with the findings of fact made by Congress in the 1974 Act. We submit, therefore, that proper judicial deference to the Congress, as well as all applicable constitutional requirements as now clarified by the Supreme Court, supports the neighborhood concept for elementary schools as adopted in Plan B, of the School District.

CONCLUSION

This case presents both the issue of the constitutionality of neighborhood schools and the issue of per-

missible scope of the remedy with unusual clarity. Both of these issues are of national importance and should be settled by this Court. It is inevitable that this Court will pass on these issues, and we respectfully submit that the constitutional demands for orderly development of the law of desegregation, and the social demands for guidance in this troubling area dictate that this Court's task of addressing the issues presented not be deferred. A Writ of Certiorari should be granted.

PRAYER

Petitioner prays that a Writ of Certiorari be granted to review the Judgment and Opinion of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

Shields Sims
Darrell Reeves
SIMS & SIMS
P.O. Box 648
Columbus, Mississippi 39701

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Shields Sims, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Certiorari on Counsel for Respondents, by depositing same in the United States Mail on October ____, 1977, addressed to Solicitor General, Department of Justice, Washington, D.C. 20530, Jeremiah Glassman, Department of Justice, Civil Rights Division, 550 11th Street N.W., Washington, D.C. 20530.

SHIELDS SIMS

APPENDIX A

UNITED STATES of America,
Plaintiff-Appellee,

v.

COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT et al.,
Defendants-Appellants.

No. 76-3781

United States Court of Appeals, Fifth Circuit.

Aug. 9, 1977

Appeal from the United States District Court for the Northern District of Mississippi.

Before GOLDBERG, CLARK and RONEY, Circuit Judges.

GOLDBERG, Circuit Judge:

In this school case we review the district court's order desegregating several elementary schools in Columbus, Mississippi. The area of disagreement between the parties is narrow. Appellant School District concedes that the current elementary student assignment pattern is invalid but asserts that the district court went too far in adopting a remedy pairing three sets of schools. The District seeks implementation of an alternative plan that would achieve less desegregation. We conclude that the district court exhibited appropriate sensitivity to the important interests on both sides of the issue, reasonably rejected the District's alternative plan, and conscientiously performed its constitutional duty. We affirm.

I.

Columbus is a small city in northeastern Mississippi having almost equal numbers of black and white students. Prior to 1970 its schools were overwhelmingly segregated.[1] The United States brought this action in July 1970 seeking to remedy that situation. *See* 42 U.S.C. §2000c-6. In August 1970 the district court entered a consent decree desegregating the junior and senior high schools.[2]

The United States returned to court in July 1975 seeking relief with respect to the elementary schools. Half the district's ten elementary schools were racially identifiable, and none approached the district's even balance between blacks and whites.[3] Hughes, by far the district's largest elementary school, was 100% black and gravely overcrowded. Coleman, Mitchell, and Union, the other traditionally black elementary schools, remained predominantly black.[4] Two-thirds of the district's black elementary students attended

1 Pursuant to official policy antedating *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), the Columbus schools were completely segregated until 1965. Before 1970 no white attended any traditionally black school, and less than 5% of the system's blacks attended traditionally white schools.

2 The decree assigned all seventh graders to a single school and all eighth graders to another. It established geographic attendance zones for the two high schools giving each an almost even mix of black and white students.

3 These figures and those throughout this opinion exclude Barrow Elementary, a school devoted exclusively to special education.

4 Coleman and Mitchell were overwhelmingly black, having black populations of 91.5 and 92.5% respectively. Union's black population was 71.7%, and for purposes of this opinion we do not count it as racially identifiable. Union's whites, however, were primarily from nearby Columbus Air Force Base, which was not within the geographic boundaries of the Columbus Municipal Separate School District. Excluding air base students, Union was 98.3% black.

identifiably black schools. Sale and Brandon, on the other hand, were identifiably white, having white populations of 99.0 and 93.2%.

The School District originally opposed modification of the consent decree, arguing that the existing desegregation met constitutional requirements.[5] The district court rejected that position, emphasizing that half the elementary schools were effectively segregated. The lawsuit's focus then shifted to the formulation of a remedy.

The District came forward with two similar proposals, referred to by the parties as Plans A and B, using attendance zone changes. The district court originally approved these proposals but later concluded they were constitutionally inadequate. The District had advanced no other alternatives, and the court accepted the government's suggestion of pairing.[6] Consistently with the government's recommendations, the court ordered the District to establish three pairings, one involving each of the most heavily segregated black schools, Hughes, Coleman and Mitchell.[7]

5 The District did seek to modify the order by altering high school attendance zones. The court approved the modification without objection from the government. The District also sought to transfer 200 Hughes students to Hunt, which houses all seventh graders, in order to alleviate the acknowledged overcrowding at Hughes.

6 Two schools are paired by combining their attendance zones and assigning each school only certain grades. In the system proposed here, two formerly 1-6 schools would be paired, one taking grades 1-3 and the other grades 4-6.

7 The court originally specified the pairings but later, without objection from the government, withdrew its order and substituted a District proposal utilizing three alternative pairings and amending various attendance zones.

On this appeal the District no longer contends that further relief is unwarranted.[8] Conceding that the elementary schools must be desegregated, the District's sole contention is that its Plan B should have been adopted rather than the government's more extensive pairing plan.[9] It is to that narrow issue that we now turn.[10]

II.

There can be no doubt that Columbus's systemwide constitutional violation called for systemwide relief. As the Supreme Court has repeatedly emphasized, the nature and extent of the constitutional violation must determine the scope of the remedy. *See, e. g., Milliken v. Bradley*, 418 U.S. 717, 744, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974) (*Milliken I; Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 16, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971). When there has been "a systemwide impact" courts must fashion "a

8 By agreeing to the consent decree in 1970 the District conceded a constitutional violation, and, as the District now acknowledges, adequate relief has not yet been afforded. Thus further relief is appropriate. *See e. g., United States v. Seminole County School District*, 553 F.2d 992 (5th Cir. 1977); *Ellis v. Board of Public Instruction*, 465 F.2d 878 (5th Cir. 1972) *cert. denied*, 410 U.S. 966, 93 S.Ct. 1438, 35 L.Ed.2d 700 (1973) (Ellis II).

9 Plan B would achieve greater desegregation than Plan A, and the District now relies on Plan B.

10 The government challenges our jurisdiction of this appeal, asserting that the notice of appeal was untimely under our decision in *Singleton v. Jackson Municipal Separate School District*, 419 F.2d 1211, 1222 (5th Cir.) (en banc), *rev'd on other grounds*, 396 U.S. 290, 90 S.Ct. 608, 24 L.Ed.2d 477 (1970). Appellants filed their notice of appeal more than one month after the judge's original pairing order but only five days after the amended pairing order adopting the plan now before us. *See* note 7 *supra*. The notice purported to appeal both orders. The appeal is undoubtedly timely with respect to the later order, and all issues in the case are properly presented on review of that order. We therefore deny the government's motion to dismiss the appeal.

systemwide remedy" *See Dayton Board of Education v. Brinkman*, ___ U.S. ___, ___, 97 S.Ct. 2766, 52 L.Ed.2d ___ (1977).

The district court's task was therefore to fashion a remedy eliminating the systemwide violation "root and branch." *See Keyes v. School District No. 1*, 413 U.S. 189, 213, 93 S.Ct. 2686, 37 L.Ed.2d 548 (1973), *quoting Green v. County School Board*, 391 U.S. 430, 438, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968). The court could not, of course, blind itself to interests other than those served by achieving complete desegregation. Its mandate was to formulate an effective remedy while simultaneously considering the interests of local authorities in "managing their own affairs, consistent with the Constitution" and the decree's "burdensome effects" on the children and the educational process. *Milliken v. Bradley*, ___ U.S. ___, ___ & n. 15, 97 S.Ct. 2749, 2757, 52 L.Ed.2d ___ (1977) (*Milliken II*). The overriding goal, however, was "to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis v. Board of School Commissioners*, 402 U.S. 33, 37, 91 S.Ct. 1289, 1292, 28 L.Ed.2d 577 (1971).[11]

11 The School District cites Justice Powell's concurrence in *Austin Independent School District v. United States*, ___ U.S. ___, 97 S.Ct. 517, 50 L.Ed.2d 603 (1977). Justice Powell, speaking for only two other justices, said that "large-scale busing is permissible only where the evidence supports a finding that the extent of integration sought to be achieved by busing would have existed had the authorities fulfilled their constitutional obligations in the past." *Id.* 97 S.Ct. at 519. Justice Powell's brief concurrence did not attempt a comprehensive statement of the standard he envisioned. He did not question the validity of such earlier decisions as *Swann*, and his concurrence was presumably fully consistent with them. Those cases, moreover, have been reaffirmed in *Dayton* and *Milliken II*, cases more recent than *Austin*. We thus adhere to the principles recounted in the text.

At any rate, while we cannot say with assurance where people would have lived, where schools would have been located, and how

The district court's application of these principles was beyond reproach. The parties narrowed the remedial alternatives to two: pairing and Plan B. In light of the proposals' effects on desegregation and the other implicated interests, we uphold the district court's choice of pairing.

Pairing promises far greater desegregation, bringing every school in the district within a relatively narrow range of the racial composition of the district as a whole. Under Plan B, in contrast, only three of the ten elementary schools would have black populations falling within twenty percentage points of the systemwide figure of 53%. The black populations in the four traditionally black schools would vary from 74% to 82%. The black populations in three traditionally white schools would vary from 22% to 26%.[12]

These figures, moreover, provide a misleadingly optimistic view of the degree of desegregation that Plan B would achieve. Although the overall black enrollment at Hughes Elementary would be reduced from the present 100% to the more promising level of 82%, grades one through four at Hughes would remain virtually 100% black. Plan B would substantially in-

much integration would have obtained absent the long standing constitutional violation — indeed, no court will ever be able to do so in any school case — we have no reason to suppose that the schools of Columbus would have been less desegregated than they will be under the pairing plan. Housing patterns would not have resulted in strict segregation, and as the District stipulated, "the availability of quality education is a factor which people consider when making the decision of whether to buy a home in a particular area."

12 We do not, of course treat such statistics as independently controlling. The Supreme Court has made clear that racial ratios provide a useful point of departure for analyzing various plans but are not to be used as rigid barriers. *See Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 22-25, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971).

tegrate grades five and six, thus improving the school's overall ratios, but would not noticeably affect the lower grades. Similarly, Union Elementary would become virtually all black for grades five and six.[13]

In sum, pairing clearly will achieve much greater desegregation than Plan B. That conclusion alone does not end our inquiry; there are other interests at stake. The desegregation disparity between the plans is substantial, however, and the pairing plan would therefore be preferred absent a showing of important other advantages attributable to Plan B.

Plan B concededly has virtues pairing lacks. By adhering more closely to the neighborhood school concept, Plan B allows more students to walk to school. Busing, however, was a tool of this and other educational systems long before desegregation became an issue, and many Columbus students will ride buses regardless of the choice between pairing and Plan B. The burden students will bear as a result of the pairing proposal's increase in busing, with routes of less than half an hour for any student,[14] pales in comparison to the interests in attending schools free of racial discrimination. Similarly, the added expense of pairing, small in terms of the District's budget, does not provide a persuasive justification for the substantial desegregation losses that Plan B would occasion.[15] Finally, the district court found, and the

13 The grade disparities would result from Plan B's transfer of Columbus Air Force Base students from Union to Hughes at the end of fourth grade.

14 Under the court's original pairings, travel time between the paired schools would have been 14, 17 and 22 minutes respectively, oneway including loading and unloading. Under the alternative pairings ultimately adopted at the School District's behest, the corresponding times would be 8, 17 and 26 minutes.

15 The maximum marginal expense of pairing would be $135,000 per year. The District's annual school budget is nearly $7,000,000.

School District does not contest, that traffic does not constitute a significant problem.[16]

One additional factor counsels approval of the district court's choice of pairing. Plan B raises substantial questions concerning the fairness of its distribution of the burdens arising from desegregation. The district court noted this problem generally, and some members of the Bi-Racial Committee[17] noted specifically that Plan B placed a disproportionate burden on students from the Columbus Air Force Base. No white students other than those from the air base would attend Hughes Elementary, the heretofore all black school that has concededly been severely overcrowded. And air base students, unlike any others in the system, would be required to change schools at the end of the fourth grade.

Reconciling the various interests implicated in any school desegregation case is no easy task. No formula exists for solving the trade off between the level of desegregation and the burdens imposed upon a school district and its students. In the case at bar, pairing achieves much greater desegregation than does Plan B, and it does so without posing intolerable burdens. The district court, showing great sensitivity to the delicacy of its task, chose pairing. The Constitution demands no less. The judgment is

AFFIRMED.

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16 Pairing also forces students to change schools after third grade. Though that is undoubtedly an undesirable effect, its importance is mitigated by the fact that students retain their same classmates despite the change of schools. Moreover, the District's own Plan B would force air base students to transfer after fourth grade. *See* note 13 *supra*.

17 The court established the Bi-Racial Committee to aid in the desegregation process.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

versus CA No. EC 70-55-S

COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL.,
Defendants.

The following proceedings were had in the United States District Court for the Northern District of Mississippi, in Oxford, Mississippi, on Thursday, May 6, 1976, before The Honorable Orma R. Smith, Judge.

APPEARANCES:

For the Government:
Honorable Jeremiah Glassman
Honorable Ross L. Connealy
Department of Justice, Washington, D.C.

For the Defendants:
Honorable Shields Sims
Honorable Darrell Reeves
Columbus, Mississippi

EDITED RULING OF THE COURT

[106] After a brief review of the pleadings filed and briefs submitted by the parties the Court is now prepared to render a bench opinion disposing of the issues presently before the Court. Should today's ruling be transcribed by the court reporter for any reason, the Court reserves the right to either edit the transcript of this ruling or to file a written opinion in the case.

The desegregation action involving Columbus School District has been on the Court's docket for most of the time that I have been on the bench. I was inducted into office in August 1968, and this case is one of the first cases filed in the Eastern Division of the Northern District of Mississippi in 1970. It bears the docket number of EC 70-55-S.

The Court has been called upon on many occasions to rule upon matters growing out of the desegregation of the Columbus Municipal Separate School District. This case has consistently presented more issues for decision by the Court than have the numerous other desegregation actions which the Court has handled in the past. Several of the Court's decisions in this case have been carried to the Court of Appeals where they have, for the most part, been affirmed.

The matters before the Court for decision today give the Court great concern, as have the various considerations present in the Court's previous rulings. Columbus is a community of many thousands of people who come from different [107] backgrounds, varying social and economic status, and, most pertinent to today's decision, different races.

The racial makeup of Columbus and Lowndes County is approximately fifty-fifty. Prior to the entry of the original order in this case Columbus operated a dual school system, as did many other towns in Mississippi and Southern states.

Most people in the South now realize that black citizens in this region have, for a long period of time, been denied equal treatment in many areas of municipal and other governmental services. The plaintiff in this case, the Justice Department, has been charged with the duty by Congress to take such action as might be necessary in order to protect the rights of minority citizens residing in Columbus. This burden has been well discharged in this case by the highly competent attorneys representing the federal government.

Several considerations have influenced the Court's decision today. First, every case of this nature has to be decided upon its own merits. Each case presents different factual situations which may require the application of different rules of law. This is amply demonstrated by the many decisions concerning integration of public schools emanating from the United States Supreme Court. There are, however, several overriding or prevailing principles in the jurisprudence in this area, the most fundamental of which is the affirmative duty which is imposed upon a school board to [108] take such action as may be necessary to remove all vestiges of past discrimination against members of the minority race. This duty is universal, but is most vigorously required of school boards which formerly operated dual systems along the lines of race.

To assist the defendant in this case in discharging its duties, and to assist the Court in its oversight of the dismantling of the dual system in the Columbus schools, a bi-racial advisory committee was established. The duties of this committee were to meet with the school board in order to attempt to resolve any difficulties which might arise in the course of the operation of the schools in the district, particularly in regard to any problems or situations with racial overtones.

Bi-racial committees of this sort have frequently been established to assist in operation of school districts which are brought before this Court; however, it has often been the case that these committees do not function actively, and more or less act as a rubber stamp in approving whatever action the school board desires to take with reference to the operation of the schools. The bi-racial committee in this case is a notable exception to the rule and has been very active. An indication of the importance which the black and white communities of the Columbus area have attached to their bi-racial committee is the interest which has been shown [109] whenever vacancies arise on the committee and it becomes necessary for the Court to select a new committee member. There has always been a great deal of interest in the appointment of new members to this committee. That is merely one of several indications of the vigorous manner in which the committee has pursued its duties and has furnished meaningful assistance to both the Court and the School Board.

Another consideration to which the Court attaches some degree of importance in reaching its decision to-

day is the history of this community. Columbus is the seat of a fine university which, although the Court will likely continue to refer to it as MSCW, is now known officially as the Mississippi University for Women.

In any event, Columbus is the seat of intellectual learning. It is a place of culture, a place where education is highly regarded by the people of the community. Accordingly, the citizens of Columbus take an active role in the operation of their public schools and demonstrate an active interest in anything which affects the education of the children of the community.

The background of this case is well stated in the Government's response to the alternate plan of elementary student assignment which was submitted by the School District. For the purpose of the record, the Court will adopt that statement which reads as follows:

> [110] "On August the 6th, 1975, this Court ordered the defendant school district to submit a plan of student assignment which would eliminate the one-race, and substantially one-race schools in the Columbus Municipal Separate School District. On November 12th, 1975, the school district was directed to file with the Court a report setting forth various alternative methods of student assignment available to effectuate this Court's August 6, 1975 order.
>
> Specifically, the defendants were order to consider the pairing of kindergarten through

the third grade and the fourth grade through the sixth of several pairs of schools based on the district's present student assignment attendance zones; and pairing based on the district's proposed student assignment attendance zones set forth in the district's Plan of Elementary Student Assignment 1976-77. The district was also ordered to consider the clustering of specified schools; and was also invited to include any other alternative plans which it desired.

On December 12, 1975, the defendant school district filed its report with the Court."

The December 1975 report left the district with two predominantly white schools, Brandon and Sale, and three predominantly black schools, Coleman, Hughes, and Mitchell. The report did not include any proposal to pair or cluster any [111] elementary schools and retained the neighborhood school concept.

After reviewing the defendants' December plan, the Court directed the school district to reconsider its plan with a view to adoption of some sort of program which would eliminate racially identifiable elementary schools, particularly the black schools, Coleman, Hughes, and Mitchell.

Turning again to the law governing this case, counsel for the Government has cited to the Court the case of *Davis v. Board of School Commissioners*, 402 U.S. 33, a 1971 case. In that opinion at page 36, the Supreme Court stated that, in cases such as this, it is the affirmative responsibility of the school district to

devise a pupil assignment plan which seeks to "achieve the greatest possible degree of actual desegregation taking into account the practicalities of the situation".

From the record before the Court today, it is apparent that pairing or clustering of the schools would achieve the greatest possible degree of actual desegregation. A compilation of the reports filed by the school district show that a pairing of Coleman, Hughes, and Mitchell with the other schools in the district would bring about an almost even racial distribution in practically all of the elementary schools of the district. These figures are shown in the Government's brief and appear correct from the record in the case. It is [112] unnecessary to dwell further upon that issue, except to include a finding that the facts in the case clearly show a pairing of the schools involved would achieve the greatest possible degree of actual desegregation.

The only further question to be resolved by the Court concerns the proposition that the Court should take into account the practicalities of the situation as it presently exists in Columbus.

Defendants have made much of the traffic problems currently plaguing them; however, the Court is not convinced that the traffic situation in Columbus now or at any time in the future would present a stumbling block over which the district could not step in order to effect a desegregation of the schools along the pairing or clustering lines.

There are two factors which the Court must take into consideration in deciding whether the practicalities of the situation would justify the Court in finding that a pairing of the schools need not be effected. The first is the fact that both the school board and the bi-racial committee have unanimously recommended to the Court that, insofar as is possible, the neighborhood concept of assignment of students should be retained. The argument for neighborhood assignment in school matters has been the subject of great debate and many opinions have been written on the issue. In all these discussions it has been recognized that assignment to neighborhood schools is preferable over any other sort, provided, however, it can be accomplished in accordance with the constitutional directive to the school authorities to remove all vestiges of present and past discrimination. There are many situations where that proviso renders the neighborhood concept unacceptable because of the distribution of the black and white population within the school district.

However, the Court must give some weight in the case at bar to the fact that the bi-racial committee, composed of an equal number of blacks and whites, has unanimously recommended to the board and to the Court that the neighborhood concept be followed if possible.

The record in the case shows that, should the Court order pairing of the schools, the school district would incur a substantial annual expense for transportation of students, over and above the present annual expenditure. Assuming the purchase of nine new buses at $12,000 each with a useful life of seven years, and taking into consideration the operating costs of these

buses, the additional expenditure would total approximately $135,000 each year. It is possible that this estimate could be reduced slightly by taking into account the fact that no busing would be required for those children living within one mile of the school to which they are assigned; however, these figures are not before the Court and nothing which is before the Court would indicate that this factor would [114] produce a substantial savings in the costs of operation of a busing program.

The school district has filed with the Court two alternate plans which they feel they can live with. Adoption of either plan would result in elimination of the racial identification of both the predominantly white schools, Brandon and Sale.

The present enrollment in Sale is 4 black students and 379 white students. By the adoption of either Plan A or B the enrollment of white students would be 78 percent and that of black students 22 percent. There would then be 85 blacks and 298 whites in attendance at Sale.

In Brandon school, the present enrollment is 415 whites and 35 blacks, for a total of 450 students. The proposed enrollment under either plan submitted by the school board would be 392 whites and 137 blacks — that is, 74 percent white and 26 percent black.

With reference to the other racially identifiable schools, Coleman, Hughes, and Mitchell, Coleman's present enrollment is composed of 22 whites and 281 blacks. Its proposed enrollment would be 60 whites and 167 blacks, the percentages becoming 26 percent white and 74 percent black.

In the Hughes school there are presently 6 whites and 685 blacks. Under Plan A, as proposed by the defendants, there would be 72 whites and 407 blacks, which would result in 15 percent whites and 85 percent blacks. Under proposed Plan B, with reference to white students, the figure would be 19 percent, and 81 percent for blacks.

In the Mitchell school, the present enrollment is 21 whites and 353 blacks. The proposed enrollment would be 69 whites and 323 blacks, resulting in a ratio of 18 percent white and 82 percent black.

There are other differences in Plan A and Plan B as submitted by the school board.

Under Plan A, the Hughes school would have an enrollment of 15 percent white and 85 percent black. Under Plan B the figures for Hughes would be 19 percent white and 81 percent black.

In the Franklin school, the enrollment would be 49 percent white and 51 percent black under Plan A, while under Plan B it would be 46 percent white and 54 percent black.

Because there are no substantial differences between the two plans, the Court has decided that, on the basis of the proposed plans and recommendations received from the school board and the bi-racial committee, and in view of the practicalities of the situation and the transportation expenses which would be incurred by requiring the school district to pair the schools, both plans should receive the approval of the Court.

The school board should be allowed to implement [116] whichever of the plans it chooses, although, all other factors being equal, the Court would prefer to see Plan B placed into effect insomuch as it provides for a larger percentage of white students in the Hughes school. An appropriate order in this regard will be entered by the Court.

APPENDIX C

(Number and Title Omitted)

The following proceedings were had in the United States District Court for the Northern District of Mississippi, in Oxford, Mississippi, on Monday, June 28, 1976, before The Honorable Orma R. Smith, Judge.

APPEARANCES:

For the Government:
Honorable Jeremiah Glassman
Department of Justice, Washington, D.C.

For the Defendants:
Honorable Shields Sims
Honorable Darrell Reeves
Columbus, Mississippi

THE COURT:

If for any reason the bench opinion which I am to render at this time is transcribed, I reserve the right to edit the opinion at a later date or to substitute a written opinion therefor.

[153] Before proceeding the Court will review some of the authorities which control the Court's action today, with reference to the several matters which are before it.

This School District was originally placed under the supervision of this Court in this case in 1970 or thereabouts. It has been with the Court now for about 6 years. At the time it was first placed under the supervision of the Court the School District and its authorities were directed to desegregate the schools and to establish a unitary system of schools within the School District. Prior to that time, as history makes it known to all of us, the school facilities in Columbus were — like those in many other towns, cities and villages in this country, not only in the South but elsewhere — were racially segregated because of former statutes and regulations. No white children attended black schools, and no black children attended white schools.

Because of this situation, duties were imposed upon the authorities in each school district to eliminate that condition and to conform the schools to a unitary system where race would not play a part in the assignment of children, and everyone, regardless of race, would be entitled to attend a public school which was desegregated and where both races could attend.

Many cases in the Fifth Circuit have been decided. The Fifth Circuit has written many opinions in school cases. [154] The Supreme Court of the United States on a number of occasions has been called upon to discuss this matter.

Fundamentally, however, I think we must all agree — lawyers, judges, and courts as well — with the statement made in *Davis v. Board of School Commissioners of Mobile County*, 402 U.S. 33, 1970, where the court said: "Having once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation."

The Court recognized that rule of law in its bench opinion rendered at a former hearing and entered an order after having discussed the practicalities of the case.

There is an evident desire by the school authorities, and I think by practically everybody in the community, that the neighborhood concept of schools be maintained if at all possible consistent with the obligation of the school authorities to perform their constitutional duty to transform the school district to a unitary system. That was one matter discussed by the Court.

Another matter discussed was that the Court was faced with the proposition that should there be a pairing of the schools, the school authorities would incur an additional yearly cost of about $130,000 to transport the children between the schools being paired.

[155] Returning to the Supreme Court decisions. The Supreme Court said in *Alexander v. Holmes County Board of Education*, 396 U.S. 19, 24 L.Ed.2d 19, a 1969 case: "Under explicit holdings of this Court the obligation of every school district is to terminate dual systems at once and to operate now and hereafter only unitary schools."

And in *Swann v. Charlotte-Mecklenburg Board of Education*, in 402 U.S. 1, 28 L.Ed.2d 554, the court said, and I quote from page 566 of the Lawyers' Edition, Second Volume, to which reference is made: "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by Brown I as contrary to the equal protection guarantees of the Constitution. That was the violation set to be corrected by the remedial measures of Brown II. That was the basis for the holding in Green that the school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch'."

And again at page 567: "In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure the unitary school system."

And in the very recent case of *United States v. Texas Education Agency*, which was cited by counsel for the [156] Government, a May 13, 1976 decision of the Fifth Circuit, 532 F.2d 380, the court, speaking at length through Judge Wisdom said, and I quote from several portions of the opinion:

> "The Supreme Court held in Brown v. Board of Education, 1954, 347 U.S. 483, 495, 74 S.Ct. 686, 692, 98 L.Ed. 873, 881, that educational facilities segregated on the basis of race are inherently unequal."

And with reference to the Board's duty in that case, Judge Wisdom said: It was the "affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial [and ethnic] discrimination would be eliminated root and branch."

And in the footnote on that page, Judge Wisdom said: "The Supreme Court has made it clear that nothing less than the elimination of predominantly one-race schools is constitutionally required in the disestablishment of a dual school system based upon segregation of the races."

And on the next page: "The constitutional duty of the school authorities is to establish a unitary system, not a unitary grade."

And on that same page: "But busing, a 'normal and accepted tool of educational policy', cannot be rejected without an evidentiary showing that 'the time or distance of travel is so great as to risk either the health of the children or significantly impinge on the educational process'."

[157] And in footnote 26, the court said: "The AISD's arguments that its school district should not be ordered to desegregate 'root and branch' because of economic cost and the specter of white flight have already been rejected by the Supreme Court. In *Watson*, 373 U.S. at 537-38, 83 S.Ct. at 1320-21, 10 L.Ed.2d 537-38, the Court was unpersuaded by the argument that desegregation of the Memphis parks should be delayed because of the expenses it would generate: It is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that

it is less expensive to deny them to afford them. We will not assume that the citizens of Memphis accept the questionable premise implicit in this argument or that either the resources of the city are inadequate, or its government unresponsive, to the needs of all of its citizens."

So the Court finds it is the affirmative duty of the Court in this case to decree and order the School District to do that which is necessary to be done in order to effect the greatest degree of desegregation in the school district.

The Court is aware that it has entered an order in the case in which it approved either Plan A or Plan B to be selected by the School Board. But, as mentioned in the earlier part of the proceedings, the matter is still within the bosom of the Court. The Court's action must be dictated by the prevailing law in such matters and the facts and the [158] practicalities of the situation.

Plan B is the plan which has been selected by the School Board. And, as shown by the chart, if Plan B is accepted, in the Hughes school grades 1, 2, 3 and 4 will be nearly 100 percent all-black; while grades 5 and 6 will be integrated grades. This results from the transportation of the predominantly white student population from the Air Base to Hughes in grades 5 and 6. And if that happens on Plan B, at Union school, in grades 5 and 6, there will be no integration of students. All but one student in both grades will be black. And at the Franklin school there will be some change, but not a material change in the degree of segregation in the school.

The Court has been faced on a number of occasions in school cases with situations where the school itself is completely integrated — all grades containing all students within the district being assigned to the school, some classes within the grades being predominantly if not all-black, resulting in the segregation of classes within grades. The Circuit Court of Appeals, in the Tate County case, held such was not acceptable. So the Court will have to reject Plan B because it does not believe the plan meets constitutional requirements.

The Court does not believe that the School District can ever come up with a plan which will not cause a great deal [159] of disagreement among the people of the district and patrons of the schools by trying to select portions of the district or portions of student bodies from one school and transporting them to another school. Therein lies the difficulty of ferreting out students which are to be selected for transfer. And, there again, we face the fact that those students and their parents who have been selected, feel that they have been imposed upon and the Court did not face up to its duty to require all citizens, all parents, and all children to do their part in the desegregation of the school district.

The Court has had occasions in other school districts where it was compelled to pair schools in order to have a unitary school system. There have been instances where the Court has had to decree busing between and among the schools in the district because the effect of the Court's order was to require students to leave the neighborhood served by their school and go to a school in another neighborhood some distance

away. The Court has held that under such circumstances it is the duty of the school board to furnish that transportation.

So the Court is going to amend its former holding in this case, rescinding such parts of previous opinions or orders as may be necessary to do so in order to comply with the final decision which is made today.

The Court is going to require the School District to [160] pair the predominantly white with the predominantly black schools, as set out in one of the reports to the Court, of which a chart has been made by the United States in its response to the Court, filed February 17, 1976. If Mitchell and Fairview are paired, the distance apart will be 3.2 miles or 14 minutes in transportation. Hughes and Brandon will pair two schools that are 17 minutes or 3.0 miles apart. Coleman and Sale will pair two schools that are 22 minutes or 3.2 miles apart.

There seems to have been two methods by which the School Board arrived at the pairing of schools. One takes into consideration the pairing of schools according to the present student assignment zones, and the other has to do with the pairing of schools employing zone changes proposed in the plan of the elementary school assignments. I am not familiar with the differences between the two.

The effect of the ruling is that the attorney for the Government and the attorneys for the School Board, and the School Board members are asked to have a meeting here, now, as soon as the Court adjourns, to select the schools, if they can, to be paired. The Court

prefers that the School Board, with the consent of the Government, select the schools to be paired, because the School Board is more familiar with the situation of the schools and of the distances that would be involved in the matter.

[161] The Court considered the expenses involved in this matter, and finds that over the years the Columbus School District has had a rather substantial budget, starting with a little over four million dollars about five years ago, in the last school year the budget was between six million and seven million dollars. The amount involved in the busing program here provided will only amount to about two percent of the entire budget. The School Board has a cushion, if necessary, to add whatever millage it might need which would be small indeed, to their request for the fixing of millage for school purposes by the town authorities. So there can't be any trouble here. It will be an expensive situation for the school but I don't see any way to avoid it.

If the Court approved Plan B the Court is satisfied the parties would be back in court next year on the same proposition, or maybe upon a reversal from the Fifth Circuit. So we are just going to have to face up to the situation. We are going to have to take a hard look at this matter and do that which we ought to do in order to get this matter settled.

Now, back of all of this is that for five years now the School Board has had within its power the assignment of students and they are charged with the affirmative duty to eliminate segregation within the school district. Here, five years later, the district has a white

school with only 4 black students. There is a black school with nearly 700 students [162] which has only 6 white students. There are other schools which are approximately 10 percent black and 90 percent white. So, there just hasn't been much achievement in the elementary schools by the School Board in meeting the affirmative burden placed upon it. In that situation the law placed upon the Court's shoulders the duty to do something about it. The longer we try to find some acceptable plan which will not require the pairing of schools the longer we will be away from final adjudication of this matter.

There are many towns within the State of Mississippi which have paired the schools. The town in which I live has paired its schools. The schools have been paired for several years. And recently the school district has been released from Judge Keady's order, although that matter is on appeal to the Fifth Circuit. But at least the school district has paired its schools, and the only objection made to the release, as the Court understands, was that the percentage of black teachers in the school district has materially decreased since the integration of the schools.

Under these facts and circumstances the School Board has not come to grips, so to speak, with the desegregation of the elementary schools and the responsibility now lies with the Court. The Court must accept that responsibility and respond to it in a manner the Court feels is necessary in order to comply with constitutional mandates which have been laid down [163] by the Supreme Court and the Fifth Circuit.

The duty and responsibility is that of the Court. The Court cannot shirk it but must assume it, and must act in that regard. The only answer, the only solution to the problem is to pair the schools involved. The Court will allow the School Board, counsel for the Government, and counsel for the School Board, however, to select the pairs. When that has been done the Government may furnish the Court with an order to be entered in the matter. The order will take effect immediately, within the course of the next school year.

The order shall provide that anything in conflict therewith contained in any previous order or opinion of the Court shall be rescinded and withdrawn, and that this is the final judgment and order of the Court.

I will be here this afternoon hearing other matters. You gentlemen let me know if you come to any agreement. If you haven't, each side may submit to me the schools that they desire to be paired.

MR. GLASSMAN:
Your Honor, in our response we had indicated that Mitchell-Fairview, Hughes-Brandon, and Coleman-Sale, as you suggested, would be appropriate pairs. There were two sets of figures though, depending on the zones —

THE COURT:
Correct.

[164] MR. GLASSMAN:
— the School District decided to use. In our response we said that either zone arrangement with those pairs would be an appropriate remedy and we would not take a position inconsistent with that now.

So, we would like the School District to suggest which zones and which pairs of schools they would like to implement.

THE COURT:

All right, will you suggest then, Mr. Sims, if you will? You can go back home if you want to and have a meeting with your School Board and discuss it and let Mr. Glassman know the selection that you have made and then he can prepare the order and submit it in that regard to the Court.

MR. SIMS:

Yes, sir. Does Your Honor intend that we bus children within the city limits?

THE COURT:

Well, I didn't say anything about that but it is my intention that you do that. However, I am going to put a limit on that. The children have to reside at least a mile from the school which they attend. Anything outside of that mile will be bused. I think it is necessary for me to do that. I did that in Greenville and other places. [165] When you take a child and he is within a mile of a school and make him attend school two or three miles away, I think in order to meet the constitutional requirements, it is incumbent upon the school district to furnish the transportation.

So the order shall provide that all children who are assigned to the paired schools who live more than a mile, in excess of a mile from the school building, will be furnished transportation.

You may want to talk to your Transportation Supervisor before you come to a conclusion about that.

Is there any question now — any question by counsel for the Government or the defendants as to any additional findings of fact or conclusions of law?

MR. GLASSMAN:

No, Your Honor.

THE COURT:

How about you, Mr. Sims?

MR. SIMS:

No, Your Honor.

THE COURT:

All right. Court will be in recess then until the time indicated.

(Concluded at 3:25 p.m., June 28, 1976.)

APPENDIX D

ORDER

(Number and Title Omitted)

The original complaint in this cause was filed by the United States against the Columbus Municipal Separate School District on July 13, 1970, under Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000c-6,

and the Fourteenth Amendment. On the same date this Court entered an order pendente lite which required the United States and the defendants to collaborate on the immediate conversion of the system to unitary status. On August 6, 1970 the United States entered into a Consent Decree with the Columbus Municipal Separate School District which had the effect of desegregating the Columbus Schools at the secondary level. However, at the elementary level, as the Court noted in its order of August 6, 1975, the defendants have concomitantly endeavored to maintain what defendants refer to as a "neighborhood concept."

The following figures reflect the racial composition of the school district's ten elementary schools for the 1974-75 school year.

School	B	W	T	%B
Brandon	26	356	382	6.8
Coleman	280	26	306	91.5
Demonstration	35	69	104	33.6
Fairview	92	431	523	17.5
Franklin	171	299	487	34.9
Hughes	753	0	753	100.0
Mitchell	383	30	414	92.5
Sale	4	385	390	1.0
Stokes	99	179	278	35.6
Union	308	121	429	71.7
Total	2151	1896	4066	52.9

The racial compositions of the elementary schools in the district have not changed appreciably since the Court first took jurisdiction of this matter; and the system has not achieved unitary status.

On July 9, 1975 the Court ordered the defendant school district to demonstrate why they should not be required to submit and implement revised student assignment plans which meet constitutional obligations that were clearly defined in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971). The Court's order was consistent with rulings of the Fifth Circuit Court of Appeals requiring re-examination of student assignment plans approved prior to the United States Supreme Court's opinion in *Swann*. See, *Flax* v. *Potts*, 464 F.2d 865 (5th Cir., 1972); *Dandridge* v. *Jefferson County School Board*, 456 F.2d 552 (5th Cir., 1972); *Ellis* v. *Board of Public Instruction of Orange County, Florida*, 465 F.2d 878 (5th Cir., 1972); *Hereford* v. *Huntsville Board of Education*, 504 F.2d 857 (5th Cir., 1974).

A hearing was held on July 31, 1975 pursuant to the Court's order of July 9, 1975. The parties at that time were afforded the opportunity to present evidence and the Court heard testimony of several witnesses as well as argument of counsel. Additionally, the Court has considered the stipulations filed in the case and the briefs submitted by counsel. The facts generally are not in dispute. From 1954 until 1965, the Columbus Municipal Separate School District continued to require the separation of students by race in its public schools and assigned students accordingly. During these years black students residing throughout the school district were assigned exclusively to Hunt High School (grades 8-12), Union Academy (grades 1-7), Hughes Elementary School (grades 1-7), Mitchell Memorial Elementary School (grades 1-7), and Coleman Elementary School (grades 1-7). With the exception of Hunt, which presently serves all 7th grade

students in the district, and Union, the above schools remain all or virtually all black today.

The district presently assigns its students to the ten elementary schools according to geographic attendance zones, pursuant to the 1970 Consent Decree. Barrow school is utilized only for special education classes in grades 1-6. Students residing on the Columbus Air Force Base are assigned to Franklin and Union elementary schools; and are transported to the school to which they are assigned. The district operates a majority to minority transfer policy. The transferring students are entitled to transportation if they so desire. The policy has had virtually no effect on desegregation in Columbus. No white student has transferred from a school in which his or her race was in the majority to a school in which his or her race was a minority.

The elementary schools with all or virtually all black student enrollments are located in close proximity to elementary schools with virtually all white student enrollments. For example, by the school district's calculations which include the loading and unloading of buses, Mitchell and Fairview are 14 minutes and 3.2 miles apart; Hughes and Brandon are 17 minutes and 3.0 miles apart; and Coleman and Sale are 22 minutes and 3.2 miles apart.

The defendants presently provide transportation to those students who reside outside the city limits of Columbus, and travel one mile or more to their assigned school. For the 1974-75 school year, the district operated 26 school buses and maintained 7 spares. The district transported 1462 students to school of whom

259 were black and 1203 were white. During the 1975-76 school year the district purchased 3 new buses and did not dispose of any vehicles.

On August 6, 1975 the Court ordered the defendants, in cooperation with the Bi-Racial Committee, to submit a plan of student assignment which would eliminate the one-race, and substantially one-race schools in the district. The Court, by way of illustration, enumerated pairing or clustering of schools, remedial altering of attendance zones, or transportation of students as methods untried by defendant school district. See *Cisneros* v. *Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir., 1972); *United States* v. *Texas Education Agency (Austin I.S.D.)* 467 F.2d 848 (5th Cir., 1972); and 20 U.S.C. 1713. In response to that order the defendants filed a plan with the Court on September 30, 1975. The plan modified several of the elementary school attendance zones, and required construction of eight new rooms at Sale. The plan would leave Hughes with an all-black student enrollment and Coleman and Mitchell with heavily black student enrollments. It appeared to the Court that the proposed plan was not the product of consideration of all the alternatives available to the defendant, that the plan did not achieve the maximum degree of desegregation possible, and that the plan contemplated new construction without the apparent objective of eradicating the vestiges of the dual system.

On November 12, 1975 the Court ordered the school district to file a report setting forth various alternative methods of student assignment available to

effectuate the Court's August 6, 1975 order. Specifically, the defendants were ordered to consider the pairing and clustering of various schools and any other alternatives they desired. The defendants filed their report on December 12, 1975. The report included the required pairing and clustering plans, and a modification of the plan submitted on September 30, 1975. This modified plan does not appear to achieve full desegregation, and would leave Hughes with an all black student enrollment. The pairing and clustering plans presented achieve the greatest degree of desegregation possible.

On April 15, 1976 the defendants presented two alternate plans of student assignment. The plans require the 5th and 6th, or 6th grade students residing on the Columbus Air Force Base to attend Hughes. Those students are presently assigned to Union and Franklin. The result of these plans would not achieve a legally acceptable degree of desegregation. Additionally, the implementation of these plans would only desegregate the 5th and 6th grades at Hughes, and would segregate the 5th and 6th grades at Union.*

There can no longer be any doubt that the Columbus Municipal Separate School District bears the "affirmative duty to take whatever step might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch" and to come forward with a desegregation plan that "promises realistically to work now." *Green* v. *County School Board*, 391 U.S. 430, 437-438, 439 (1968). This obligation of a school system "to operate now and hereafter only unitary schools" was reiterated in *Alexander* v. *Holmes County Board of Education*, 396 U.S. 19, 20 (1969), and *Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290 (1970).

* While not controlling, the Court also notes that one plan was opposed by 6 members of the Bi-Racial Committee, and the other plan was opposed by 9 members. The reasons for opposition were varied. Some members stated the plans put too much burden on the Air Base, others thought the plans went too far.

The Court, after finding a violation must require a plan of student assignment which seeks to "achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation. *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). On May 6, and June 28, 1976 the Court held a hearing to consider which plan presented by the defendants would be a constitutionally appropriate remedy in the case.

As the Court stated in its bench ruling of May 6, 1976, it is apparent that the pairing or clustering of schools would achieve the greatest degree of actual desegregation in Columbus. The Court must then turn to the practicalities of the situation.

The defendants' primary objections to pairing is that the employment of this desegregation device will require busing and that the school district must bear the expense of busing. However, the record discloses that many of the schools which are involved in the pairing plans share a common boundary. The times and distances between these schools are minimal.

The district has also submitted reports which show that the cost of pairing, with all factors considered, is $135,000 per year. However, this expense is not so great as to foreclose pairing as an acceptable remedy

in this case. The Columbus Municipal Separate School District has a substantial annual budget. The record shows that the budget is in excess of 6.9 million dollars per annum. The cost of full desegregation is less than two percent of the district's budget. While the district should attempt to minimize the cost of busing, the overriding goal is the disestablishment of the dual system. *United States* v. *Texas Education Agency*, supra. Whatever financial limits there may be in reaching this goal, those limits have not been reached here.

Having considered the pleadings, stipulations, briefs, reports and responses and having heard the testimony of numerous witnesses, as well as argument of counsel, it is

ORDERED, ADJUDGED and DECREED

1. That the plans of student assignments for the elementary schools, as reflected in Exhibits 7, 3 and 2 of the report filed with the Court on December 15, 1975 in response to the Court's order of November 15, 1975, be implemented by the defendant Columbus Municipal Separate School District effective with the 1976-77 school year. Those plans are summarized below.

a) Brandon Elementary School grades (K-3) and Hughes Elementary School grades (4-6) are to be paired. All elementary school students in grades K-3 residing in the Brandon or Hughes attendance zones as set forth in the Consent Decree entered by the Court on August 6, 1970 will attend Brandon Elementary

School. All elementary school students in grades 4-6 residing in these zones will attend Hughes Elementary School.

b) Fairview Elementary School (grades K-3) and Mitchell Elementary School (grades 4-6) are to be paired. All elementary school students in grades K-3 residing in the Fairview or Mitchell attendance zones as set forth in the Consent Decree entered by the Court on August 6, 1970 will attend Fairview Elementary School. All elementary students in grades 4-6 residing in those zones will attend Mitchell Elementary School.

c) Sale Elementary School (grades (K-3) and Coleman Elementary School (grades 4-6) are to be paired. All elementary school students in grades K-3 residing in the Sale or Coleman attendance zones as set forth in the Consent Decree entered by the Court on August 6, 1970 will attend Sale Elementary School. All elementary school students in grades 4-6 residing in those zones will attend Coleman Elementary School.

2. The Columbus Municipal Separate School District will furnish transportation to all students who reside more than one mile road distance from the school which they will be assigned under the desegregation plan set forth in paragraph 1 (a-c) above. This provision shall be effective commencing in September 1976.

3. All prior orders of this Court not inconsistent herewith, shall remain in full force and effect.

Done, this 12th day of July, 1976.

/s/ ORMA R. SMITH
UNITED STATES DISTRICT
JUDGE

APPENDIX E

ORDER

(Number and Title Omitted)

On July 12, 1976 the Court entered an Order requiring the defendant Columbus Municipal Separate School District to desegregate its schools. The plan of desegregation, effective with the 1976-77 school year, requires the district to pair several elementary schools.

Subsequent to that Order, and consistent with the representation made by the United States in its July 6, 1976 letter to the Court, the defendants have decided to elect alternative pairing and zone arrangements to desegregate its schools. The United States has reviewed the plan and believes that the degree of desegregation provided is consistent with the plan contained in the Court's July 12, 1976 Order. The Court is of the opinion that the alternate plan is Constitutionally appropriate,

ORDERED, ADJUDGED and DECREED

1. That the plans of student assignments for the elementary schools of Columbus Municipal Separate School District, together with the boundaries as summarized below be implemented:

Brandon-Hughes Pairing and Zone

(a) All students in grades 1, 2 and 3 residing within the boundaries of the herein described zone are assigned to Brandon School and all students in grades 4, 5 and 6 are assigned to Hughes School.

The northwestern corner is the intersection of the Tombigbee River and the north district boundary line, then south along the Tombigbee River to the intersection of the southwest corner of Section 11, Range 19 West, Township 18 South, and the Tombigbee River, then east along the section line to the northeastern corner of Section 18, Range 18 West, Township 18 South, then in a northeasterly direction to the northernmost extremity of 1st Street North, then continuing northeasterly to the intersection of 18th Avenue North and U. S. Highway 82 Bypass, then easterly along U. S. Highway 82 Bypass to intersection with the C & G Railroad, then south along the C & G Railroad to the intersection with 14th Avenue North, then east along 14th Avenue North to the intersection with 21st Street North, then north one block along 21st Street North to the intersection with 15th Avenue North, then easterly along 15th Avenue North to the intersection with 25th Street North, then south one block along 25th Street North to the intersection with 14th Avenue North, then easterly along 14th Avenue North and continuing on a line to the Luxapalila River, then northerly along said river to the intersection with the school district's eastern boundary, then north along said boundary to the school district's northern boundary, then west along the north boundary to the point of beginning.

(b) Stokes-Beard Zone (All students, grades 1-6)

Beginning at intersection of Southern Railroad and 14th Avenue North, go east along 14th Avenue North to the intersection of 14th Avenue North and Waterworks Road and continue east on a line to Luxapalila River, then south and west along Luxapalila River to a point due east of the intersection of 25th Street South and 3rd Avenue South. Then west on a line to 3rd Avenue South, continuing west on 3rd Avenue South to the intersection of 22nd Street South and 3rd Avenue South, then north on 22nd Street South to intersection of 2nd Avenue South, then east along 2nd Avenue South to the intersection of 2nd Avenue South and the Southern Railroad, then north along Southern Railroad and C & G Railroad to intersection of 18th Street North and C & G Railroad, then north two blocks on 18th Street North in intersection of 7th Avenue North, then east along 7th Avenue North to intersection of Southern Railroad, then north along Southern Railroad to point of beginning.

(c) Demonstration Zone (All students, grades 1-6)

Beginning at intersection of 2nd Avenue North and city limits line, go east along 2nd Avenue North and one block north on 17th Street North to intersection with 3rd Avenue North, then along 3rd Avenue North to intersection of 3rd Avenue North and Southern Railroad, then south along Southern Railroad to intersection of 2nd Avenue South and 17th Street South, then south along 17th Street South to intersection with 8th Avenue South, then one block west to intersection of 8th Avenue South and 15th Street South, then on a line in a southwesterly direction to corner of 13th Street South and 9th Avenue South, then west along

9th Avenue South to intersection with 4th Street South, then north to the intersection of G M & O Railroad, then westerly along G M & O Railroad to city limits western boundary, then north along city limits line to 2nd Avenue North and point of beginning.

(d) Sale-Mitchell Zones

All students in grades 1, 2 and 3 residing within the boundaries of the herein described zones are assigned to Sale School and all students in grades 4, 5 and 6 are assigned to Mitchell School.

(e) Sale-Mitchell Zone A

The northeastern corner of this zone is the intersection of the Luxapalila River and the school district's eastern boundary, then south along the school district's eastern boundary to the intersection with U. S. Highway 82, then west along U. S. Highway 82 to the intersection with Gaylane Drive, then north along Gaylane Drive to the intersection with Cypress Street then westerly along Cypress Street to the intersection with Forrest Boulevard, then westerly along Forrest Boulevard to the intersection with McCrary Road, then north along McCrary Road to the intersection with Bois de Arc Avenue, then west along Bois de Arc and continuing on a line to the Luxapalila River, then northerly along said river to the point of beginning.

(f) Sale-Mitchell Zone B

Beginning at the intersection of the Tombigbee River and G M & O Railroad go east along G M & O Railroad to intersection of 4th Street South, then south

one block along 4th Street South to intersection of 9th Avenue South, then east approximately eight blocks along 9th Avenue South to the northeastern corner of 9th Avenue South and 13th Street South, then on a line in a northeasterly direction to intersection of 16th Street South and 8th Avenue South, then west along 8th Avenue South one block, then southeasterly one block along 8th Avenue South, then continue southeasterly on a line to a point on Luxapalila River where the municipal boundary intersects with the Luxapalila River, then south and west along the Luxapalila River to the Tombigbee River then north on the Tombigbee River to the point of beginning.

(g) Fairview-Coleman Zone

All students in grades 1, 2 and 3 residing within the boundaries of the herein described zone are assigned to Fairview School and all students in grades 4, 5 and 6 are assigned to Coleman School.

The northwestern corner of this zone is the intersection of 17th Street South and 2nd Avenue South, then south along 17th Street South to the intersection with 8th Avenue South, then southeasterly on a line to the intersection of the Pickensville Road and the Luxapalila River, then southerly along said river to the southern boundary of the school district, then east along the southern boundary of the school district to the eastern boundary of the school district, then north along the eastern boundary to the intersection with U. S. Highway 82, then west along U. S. Highway 82 to the intersection with Gaylane Drive to the intersection with Cypress Street, then east along Cypress Street to the intersection with Forrest Boulevard, then

southwesterly along Forrest Boulevard to the intersection with McCrary Road, then north along McCrary Road to the intersection with Bois de Arc Avenue, then west along Bois de Arc and continuing on a line to the Luxapalila River, then southerly along said river to a point due east of the eastern extremity of 3rd Avenue South, then due east on a line to 3rd Avenue South and along 3rd Avenue South to the intersection with 22nd Street South, then north one block on 22nd Street South to 2nd Avenue South, then east along 2nd Avenue South to the point of beginning.

(h) Union Zone (All students, grades 1-6)

Beginning at intersection of Railroad Street and 14th Avenue North, go east on 14th Avenue North to intersection of Southern Railroad, then southwesterly along Southern Railroad to intersection of Southern Railroad and 7th Avenue North, then west on 7th Avenue North to the intersection of 15th Street North, then north one block north on 15th Street North to the intersection of 8th Avenue North, then west three blocks on 8th Avenue North to the intersection of Military Road and 8th Avenue North, then northerly on Military to intersection of Military Road and 12th Avenue North, then east on 12th Avenue North to intersection of Railroad Street, then north on Railroad Street one block to the point of beginning. All students in grades 1-6 living on CAFB will be assigned to either Franklin or Union.

(i) Franklin Zone (all students, grades 1-6)

The northwest corner of this zone is intersection of the southern boundary of Section 11, Range 19 West,

Township 18 South and the Tombigbee River. Thence east along said section line to the northwest corner of Section 18, Range 19 west, Township 18 South, thence northeasterly to the extreme northernmost point of First Street North, thence northeasterly to the intersection of 18th Avenue North and U. S. Highway 82 Bypass, then north and west along the proposed route of said Highway to intersection of the C & G Railroad, then south along C & G Railroad to intersection of 12th Avenue North, then westerly along 12th Avenue North to Military Road, then south on Military Road to 8th Avenue North, then east three blocks on 8th Avenue North to 15th Street North, then south one block on 15th Street North to 7th Avenue North, then east four blocks along 7th Avenue to 18th Street North, then south on 18th Street North to C & G Railroad, then south on C & G Railroad to 3rd Avenue North, then east on 3rd Avenue North to 17th Street North, then south one block to 2nd Avenue North, then west on 2nd Avenue North to city limits, then continue east along city limits line to Tombigbee River, then west and north approximately six miles along Tombigbee River to point of beginning.

All students in grades 1-6 living on Columbus Air Force Base will be assigned to either Franklin Academy or Union Academy.

(j) Barrow School and Special Education Classes: E.M.R., L.D., T.M.R., H.I.

This plan proposes to close Barrow School which presently is designated as a separate center for all Educable Mentally Retarded students in this school district. These students will be enrolled in their own neighborhood school or in as close proximity as feasi-

ble to organize a class for their particular area of exceptionality. Another area of special education for which special classes are being provided is learning disabilities. There are now approximately 60 students enrolled in four separate locations. These students will also be assigned to schools where it is feasible to organize a class for this area of exceptionality.

All students in the district enrolled in the Hearing Impaired class will continue to attend Franklin where a special laboratory has been equipped to accommodate this area of exceptionality.

There are presently two centers to house students who are eligible for special educational services as trainable mentally retarded. These two separate centers will continue to serve these students in a self contained classroom situation.

Approximately ten students are in each class. One center is on Lee Square and will be attached to Franklin School for administration purposes and the other is in a facility located at Hunt School and will be attached to Hunt for administrative purposes.

All other classes which may be organized to accommodate other areas of exceptionality will be housed in the most appropriate and feasible location for eligible students to receive special services.

2. Attached hereto Exhibit 1, 2 and 3 to this Order is a graphical form of the Black-White ratio in each of the above schools under the pairing as listed. Also attached hereto is a map of the City of Columbus identifying the location of said schools, the pairings as

above listed and the boundaries as above described, which is identified as Exhibit 4 in said Order.

3. The Columbus Municipal Separate School District will furnish transportation to students who reside inside the city and more than one mile road distance from the school under the following:

(a) All 1, 2, and 3rd grade students in the former Coleman, Hughes, and Mitchell zones living more than one mile road distance to Brandon, Fairview and Sale will be provided transportation.

(b) All 4th, 5th, and 6th grade students in the former Brandon, Fairview and Sale zones living more than one mile road distance to Coleman, Hughes and Mitchell will be provided transportation.

This provision shall be effective commencing in September 1976.

4. This Order is Agreed as to Form only in compliance with instructions of the Court and does not affect the rights of appeal of the parties to this cause.

5. All prior orders of this Court not inconsistent herewith, shall remain in full force and effect.

ORDERED, this the 11 day of August, A.D., 1976.

/s/ ORMA R. SMITH
UNITED STATES DISTRICT
JUDGE

AGREED AS TO FORM:
/s/ JEREMIAH GLASSMAN
JEREMIAH GLASSMAN, ATTORNEY FOR
UNITED STATES OF AMERICA

/s/ SHIELDS SIMS
SHIELDS SIMS, ATTORNEY FOR
COLUMBUS MUNICIPAL SEPARATE
SCHOOL DISTRICT

Exhibit "1"

COMPOSITE BUILDING INFORMATION FORM
COLUMBUS, MISSISSIPPI

Date: July 9, 1976

Name of School	Grades	Capacity Perm.	Capacity W.Ports	Students W	Students B	Students T	Staff W	Staff B	Staff T	W-B Ratio
Sale	1 - 3	324	432	180	179	359				50 - 50
Mitchell	4 - 6	513	540	170	151	321				53 - 47
Fairview	1 - 3	567	-	246	229	475				52 - 48
Coleman	4 - 6	486	-	193	139	332				58 - 42
Brandon	1 - 3	648	-	280	241	521				54 - 46
Hughes	4 - 6	648	810	215	269	484				45 - 55
Franklin	1 - 6	675	-	226	275	501				45 - 55
Union	1 - 6	648	-	112	375	487				23 - 77
Demonstration	1 - 6	243	-	78	71	149				52 - 48
Stokes-Beard	1 - 6	324	-	120	124	244				49 - 51

School	Grade	1	2	3	4	5	6	Total Enrollment	Ratio	Permanent Capacity	Total capacity W/Portables
Fairview	Black	78	88	63				229	48%		
	White	85	85	76				246	52%		
	Total	163	173	139				475		21-567	
Coleman	Black				39	49	51	139	42%		
	White				63	65	65	193	58%		
	Total				102	114	116	332		18-486	

Pair Mitchell — Sale

School	Grade	1	2	3	4	5	6	Total Enrollment	Ratio	Permanent Capacity	Total Capacity W/Portables
Sale	Black	56	63	60				179	50%		
	White	69	68	43				180	50%		
	Total	125	131	103				359		12-324	16-432
Mitchell	Black				35	58	58	151	47%		
	White				52	57	61	170	53%		
	Total				87	115	119	321		19-513	20-540

Pair Hughes — Brandon

School	Grade	1	2	3	4	5	6	Total Enrollment	Ratio	Permanent Capacity	Total capacity W/Portables
Brandon	Black	79	81	81				241	46%		
	White	109	107	64				280	54%		
	Total	188	188	145				521		24-648	
Hughes	Black				77	92	100	269	55%		
	White				72	77	66	215	45%		
	Total				149	169	166	484		24-648	30-810

52a

School	Grade	1	2	3	4	5	6	Total Enrollment	Ratio	Permanent Capacity	Total Capacity W/Portables
Franklin	Black	39	43	58	40	51	44	275	55%		
	White	39	39	26	40	43	39	226	45%		
	Total	78	82	84	80	94	83	501		25-675	
Union	Black	60	65	68	60	62	60	375	77%		
	White	19	19	22	17	25	10	112	23%		
	Total	79	84	90	77	87	70	487		24-648	

School	Grade	1	2	3	4	5	6	Total Enrollment	Ratio	Permanent Capacity	Total Capacity W/Portables
Stokes-	Black	22	22	18	19	20	23	124	51%		
Beard	White	25	25	10	19	22	19	120	49%		
	Total	47	47	28	38	42	42	244		12-324	
Dem.	Black	13	13	13	10	9	13	71	48%		
	White	11	11	14	16	14	12	78	52%		
	Total	24	24	27	26	23	25	149		9-243	

53a

APPENDIX F

ORDER

(Number and Title Omitted)

Pursuant to, and enlarging upon, the bench ruling rendered herein in open court on May 6, 1976, it is

ORDERED:

(1) That implementation of either Alternative Plan A or B as submitted by the defendant school board shall be and the same is hereby approved, the court reserving the right, should circumstances warrant, to, upon further inquiry and prior to July 1, 1976, specifically designate which of the two plans the school district will be required to implement;

(2) That, no later than May 31, 1976, defendants shall file with the court and serve upon counsel opposite a designation of the plan which the school board desires to implement, and include a detailed explanation as to the reasons upon which the board relied in determining that the plan selected is perferable to the plan rejected by the board;

(3) That, no later than May 31, 1976, defendants shall file with the court and serve upon counsel opposite a detailed description of the zone boundaries which would be employed should either plan A or B be implemented by the school district;

(4) That, no later than May 31, 1976, defendants shall file with the court and serve upon counsel opposite a statement separately setting forth the details of the operation of plans A and B and the relative effect of each of these plans upon the pupils served by the district;

(5) That counsel for plaintiff shall respond to the pleadings filed by defendants pursuant to paragraphs 2, 3, and 4 above no later than June 15, 1976; and

(6) That, upon their application, defendants are hereby granted authority to increase the size of the libraries at the individual elementary schools within the district when such increases are necessary for accreditation purposes without securing prior leave of court.

This 11th day of May, 1976.

/s/ ORMA R. SMITH
UNITED STATES DISTRICT
JUDGE

Supreme Court, U. S.
FILED
DEC 18 1977
MICHAEL RODAK, JR., CLERK

No. 77-626

In the Supreme Court of the United States

OCTOBER TERM, 1977

COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-626

COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners, a Mississippi school district and some of its officials, seek review of a judgment requiring the school district to desegregate four overwhelmingly black elementary schools, schools that had been designated for black students when state law required a dual school system.[1]

The United States instituted this suit in 1970; it sought desegregation of petitioners' schools. A consent decree was entered that year, desegregating the junior and senior high schools (Pet. App. 2a and n. 2).

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[1]Petitioners maintained their dual system for more than 10 years after this Court decided *Brown* v. *Board of Education*, 347 U.S. 483. See Pet. App. 2a n. 1.

The current proceedings began in 1975, when the United States sought relief with respect to the elementary schools. Three elementary schools, formerly reserved by law for black students, still had student populations more than 90 percent black (Pet. App. 2a and n. 4). A fourth school, except for the attendance of some white children from a military base outside petitioner's geographic boundaries, had a student population more than 98 percent black (*ibid.*).

Petitioners conceded in the court of appeals (Pet. App. 1a, 4a) that these schools were substantial vestiges of the statutorily-mandated dual system, and that the Constitution required a remedy.[2] The district court required petitioners to "establish three pairings, one involving each of the most heavily segregated black schools" (*id.* at 3a; see also *id.* at 40a-49a).

Petitioners argue that they should have been permitted to implement one of the two remedial plans they proposed in the district court. The court of appeals, in an opinion on which we rely, considered petitioners' contentions and rejected them (Pet. App. 6a-8a). It noted that petitioners' plan would leave four grades at one school and two grades at another "virtually 100% black" (*id.* at 6a-7a), and it observed that allowing such racial identifiability to continue would not comply with the constitutional

[2]A great deal of petitioners' argument in this Court (Pet. 5-20) seems to take issue with this concession and to contend that the United States has not established a violation of the Constitution. This argument, to the extent it is contrary to petitioners' concession below, has not been properly preserved. It is, in any event, frivolous, because state law required racial separation in petitioners' schools, and the school district preserved total separation until 1965 (Pet. App. 2a n. 1). There was unquestionably intentional racial discrimination, and the only open questions concern the formulation of a remedy that will eliminate all vestiges of that discrimination.

requirement to eliminate the vestiges of discrimination "root and branch." *Green* v. *County School Board*, 391 U.S. 430, 438. After concluding (Pet. App. 4a-6a) that the remedy selected by the district court was consistent with *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, and *Dayton Board of Education* v. *Brinkman*, No. 76-539, decided June 27, 1977, the court of appeals considered and rejected petitioners' contentions based on factors such as transportation time (Pet. App. 7a and n. 14) and expense (*id.* at 7a and n. 15).

The decision of the court of appeals applies settled principles to the particular situation of this school district. There is no reason for this Court to review the essentially factual conclusion, concurred in by two lower courts, that the desegregation plan favored by petitioners was inadequate to overcome all of the lingering consequences of the dual school system the school district had maintained for many years.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

DOJ-1977-12